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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

COUNTY BOARD OF ELECTIONS, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

MEMORANDUM FOR THE UNITED STATES

The United States fully agrees with the appellants that, if this Court has jurisdiction of the appeal, the case merits plenary consideration and might appropriately be fixed for argument this Term together with *Katzenbach* v. *Morgan*, Nos. 847 and 877, jurisdiction noted January 24, 1966. We believe it necessary, however, to alert the Court to a serious jurisdictional question in the case which might require dismissal of the appeal—leaving the present appellants free, of course, to participate *amicus curiae* in the *Morgan* case.

The present suit was initiated by the United States to enjoin the election officials of Monroe County, New York, from applying the New York English literacy

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law against otherwise qualified Puerto Rican citizens who were exempted from the requirement by Section 4(e) of the Voting Rights Act of 1965. The claim was thus one under the Supremacy Clause, asserting the primacy of the federal enactment over conflicting provisions of State law. Although the existence of the conflict was never disputed, the case would not seem one requiring the convening of a three-judge court under Section 2281 of the Judicial Code, as construed by this Court's decision in *Swift & Co.* v. *Wickham,* No. 9, this Term, decided November 22, 1965. In light of the disposition of *Swift* and the recent ruling in *Utilities Comm'n* v. *Pennsylvania R. Co.,* No. 375, decided December 13, 1965, it would appear to make no difference that the three-judge court, when convened, might have seemed necessary under the then authoritative decision of this Court in *Kesler* v. *Department of Public Safety,* 369 U.S. 153. Cf. note 15 to the opinion below, J.S. App. 15.[1]

Nor does there appear to have been any cause for convening a three-judge court under Section 2282 of the Judicial Code. Albeit the only issue mooted in the court below was the constitutionality of the federal statute, no application for an injunction "restraining [its] enforcement, operation or execution"

[1] We note that here, as in *Swift,* a ruling that the three-judge court was improperly convened would not require a retrial in the district court because the district judge to whom the case was initially assigned joined in the decision and adopted the opinion of the court as his own. Nor is the problem involved in *Pennsylvania R. Co.* presented here since appellants have taken the precaution of filing a timely appeal to the United States Court of Appeals for the Second Circuit.

was ever submitted. The unconstitutionality of Section 4(e) was merely asserted by way of defense, as a ground for the dismissal of the government's complaint. In that circumstance, a statutory court of three judges would not seem to have been properly convened under 28 U.S.C. 2282. *Garment Workers* v. *Donnelly Co.*, 304 U.S. 243; see *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 152–155.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

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